RECORD AND BRIEFS

No. 16-784

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IN THE

# Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

*Petitioner,*

*v.*

FTI CONSULTING, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether 11 U.S.C. § 546(e) prohibits the avoidance of a settlement payment or a transfer made in connection with a securities contract where neither the debtor nor the transferee (or entity for whose benefit the transfer was made) is a financial institution or other entity named in the statute but where the transfer passed through such an entity as a conduit.

## RULE 29.6 STATEMENT

Respondent FTI Consulting, Inc., has no corporate parent and no publicly held company owns 10% or more of the company.

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## STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions included in the appendix to the petition, § 550 of the Bankruptcy Code is reproduced at Resp. App. 1–3.

## STATEMENT

### A. Statutory Framework

Chapter 5 of the Bankruptcy Code provides a trustee with broad powers to avoid and recover pre-petition transfers of property in which the debtor had an interest for the benefit of the creditors. These powers are part of a larger statutory scheme designed to ensure the equitable distribution of the estate's property to its creditors. (Pet. App. 7). The trustee's powers to avoid and recover pre-petition transfers are codified in §§ 544, 547, 548, and 550 of the Bankruptcy Code.[1]

Section 546(e) of the Bankruptcy Code provides a broad, but not limitless, exception to these avoidance powers.[2] In short, § 546(e) provides a safe harbor from fraudulent transfer liability to certain enumerated entities by prohibiting a trustee from avoiding:

> A margin payment or settlement payment made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities

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[1] *See* 11 U.S.C. §§ 544, 547, 548, & 550.

[2] *Id.* § 546(e).

> clearing agency (collectively referred to herein as "Protected Entities"); OR
>
> A transfer made by or to (or for the benefit of) a Protected Entity in connection with a securities contract.[3]

The application of the safe harbor here turns on the meaning of the statutory phase "made by or to (or for the benefit of)."

### B. Factual Background

This case arises out of the bankruptcy of Valley View Downs, L.P. ("Valley View Downs"), one of the debtors in *In re Centaur, LLC et al.*, jointly administered under Case No. 10-10799 in the United States Bankruptcy Court for the District of Delaware (the "Centaur Bankruptcy Case"). (Pet. App. 3). Plaintiff–Respondent FTI Consulting, Inc. (the "Trustee") brought this action in the District Court for the Northern District of Illinois in its capacity as the trustee of the Centaur, LLC Litigation Trust (the "Litigation Trust"). (*Id.*). The Litigation Trust was formed pursuant to the plan of reorganization that was confirmed in the Centaur Bankruptcy Case (the "Confirmed Plan"). (*Id.* at 21). Pursuant to the terms of the Confirmed Plan and the Litigation Trust Agreement, Valley View Downs assigned and transferred certain avoidance actions against Defendant–Petitioner Merit Management Group, L.P. ("Merit") to the Litigation Trust. (*Id.*). The Trustee filed suit against Merit on October 27, 2011, asserting

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[3] *Id.*

two causes of action for the avoidance and recovery of a $16,503,850 transfer made by the debtor, Valley View Downs, to Merit as constructively fraudulent under §§ 544, 548(a)(1)(B), and 550 of the Bankruptcy Code. (*Id.* 3).

The transfers at issue were made in connection with a settlement agreement between Valley View Downs and Bedford Downs Management Corporation ("Bedford Downs"). (*Id.* at 20). The terms of the settlement agreement required, among other things, for Valley View Downs to purchase all of Bedford Downs' outstanding shares from its shareholders for a total of $55 million in exchange for Bedford Downs' agreement to bow out of the ongoing competition for the last harness racing license available in Pennsylvania. (*Id.*). On October 30, 2007, pursuant to the terms of this agreement, Valley View Downs transferred $55 million to the shareholders of Bedford Downs, including a transfer of $16,503,850 to Merit as a 30.007% owner of Bedford Downs. (*Id.*).

The undisputed facts relevant to whether the § 546(e) safe harbor applies in this case can be summarized as follows:

1. Valley View Downs transferred $16,503,850 to Merit as consideration for its shares in Bedford Downs (the "Transfers").

2. The Transfers were either settlement payments or made in connection with a securities contract.

3. The Transfers were made *by* Valley View Downs *to* Merit *through* Credit Suisse and Citizens Bank of Pennsylvania ("Citizens Bank"). Credit

Suisse and Citizens Bank acted solely as conduits in the transaction.

4. Neither Valley View Downs (the debtor) nor Merit (the transferee) is, or ever was, a "financial institution" as defined by the Bankruptcy Code.

### C. Proceedings Below

In its motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, Merit argued that the Transfers were protected from avoidance by the § 546(e) safe harbor. (*Id.* at 19–21). The District Court agreed. (*Id.* at 39). In granting Merit's motion, the District Court found that the Transfers were "made by or to" a financial institution because, the court reasoned, the funds passed *through* at least two financial institutions—Credit Suisse and Citizens Bank—on their way to Merit. (*Id.* at 37). Based upon this finding, the District Court held that the Transfer was protected from avoidance by the "plain meaning" of § 546(e) of the Bankruptcy Code. (*Id.*).

FTI appealed the decision. After considering over a hundred pages of briefing on the single issue of the meaning of the statutory phrase "made by or to (or for the benefit of)" and hearing oral argument, the Seventh Circuit reversed the District Court and remanded the case. (*Id.* at 18). Specifically, the Seventh Circuit held that § 546(e) does not provide a safe harbor to transfers that merely pass *through* a financial institution or other Protected Entity where neither the debtor nor the defendant–transferee are themselves Protected Entities. (*Id.*)

The Seventh Circuit began its analysis with the relevant statutory language to determine whether its meaning, *i.e.*, the intent of Congress, was clear on its face. (*Id.* at 5). Because the express statutory language has several plausible meanings, the Seventh Circuit determined that the meaning of the statute is ambiguous. (*Id.* at 5–6). Thus, it turned to the context and purpose of the statute to choose between the competing interpretations. (*Id.* at 7 (citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d. 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their overall place in the statutory scheme.")).

In doing so, the Seventh Circuit first analyzed § 546(e) within the context and purpose of the statutory provisions to which the safe harbor provides an exception—namely, the avoidance provisions found in §§ 544, 547, and 548. (Pet. App. 7–9). The court concluded that "Chapter 5 creates both a system for avoiding transfers and a safe harbor from avoidance—logically, these are two sides of the same coin." (*Id.* at 8).

Next, the court compared the language of various provisions of chapter 5 and other sections of the Bankruptcy Code to the language used in § 546(e) to ensure it was interpreting the statute "as a symmetrical and coherent regulatory scheme." (*Id.* at 7 (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). Specifically, the court examined the language, purpose, and context of §§ 548(a)(1),

548(c), 548(d)(2), 548(a)(2), 550, 555, 365(e), and 362(a). (Pet. App. 9–13). From its review of the relevant statutory framework, the court concluded that, in enacting § 546(e), Congress was concerned with the economic substance of transactions—not the manner in which transactions are consummated. (*Id.* at 12).

Finally, to complete its analysis, the Seventh Circuit examined the history of the § 546(e) safe harbor and the particular risk Congress was responding to by enacting it. (*Id.* at 13–14). After doing so, the court concluded that its interpretation of § 546(e)—*i.e.*, that it does not cover all "transactions involving securities that uses a financial institution or other named entity as a conduit for funds"—is consistent with the safe harbor's legislative history. (*Id.* at 14–16).

## REASONS FOR DENYING THE PETITION

### A. The Question Presented Does Not Merit Review.

Petitioner's claim that the circuits are deeply divided on the proper meaning of the words "made by or to (or for the benefit of)" found in § 546(e) is not supported by the relevant case law. (Pet. 9). Although several courts have nominally passed on this issue, this case represents the first decided by any circuit court where the interpretation of the statutory language "by or to (or for the benefit of)" was the sole issue considered and addressed. Indeed, the Seventh Circuit is the only circuit court of appeal that has fully analyzed the relevant statutory language by placing it

within the purpose and context of chapter 5 of the Bankruptcy Code as a whole.

As demonstrated below, no other circuit court has given the relevant statutory language the attention necessary to fully address the issue presented here. As such, this issue should be allowed to percolate back up to the circuit courts that have already ruled on it, albeit in a cursory fashion, so that they may reconsider the issue with the benefit of the detailed analysis performed by the Seventh Circuit. Simply put, given the recency of the Seventh Circuit's opinion, a review of this issue would be premature.

No court, other than the Seventh Circuit, has analyzed the statutory language of § 546(e) under the simple and undisputed facts presented here. The Tenth Circuit was the first to address this issue in *Kaiser Steel*.[4] There, the contested transfers passed through numerous financial intermediaries on their way from the debtor to the debtor's former shareholders.[5] Although, based upon these facts, the court concluded that § 546(e) barred the avoidance of the transfers received by the shareholders, the Tenth Circuit was never presented with the question presented here—*i.e.*, whether § 546(e) applies where neither the debtor nor the transferee is a Protected Entity. This is because the Kaiser trustee admitted that the transfers at issue were "made by" a stockbroker (*i.e.*, a Protected Entity), *not* by the debtor. Given this admission, the applicability of the

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[4] *Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.)*, 952 F.2d 1230, 1235 (10th Cir. 1991).

[5] *Id.* at 1235–36.

safe harbor was clear and the trustee was left to take the dubious position that by using the phrase "by *or* to" Congress meant "by *and* to."[6] Based upon the trustee's admission and flawed argument, the court applied § 546(e) to bar the avoidance of the contested transfers.[7]

The majority of the case law on the meaning of "by or to" as used in § 546(e), however, developed in the wake of the Eleventh Circuit's opinion in *In re Munford, Inc.*[8] In *Munford* the trustee brought claims to avoid transfers made by Munford to its shareholders in connection with a leveraged buyout.[9] The court recognized that "a section 546(e) financial institution was presumptively involved in the transaction."[10] Nevertheless, the court held that § 546(e) did not apply because neither the debtor nor the transferees (*i.e.*, the shareholders) were entities protected by the statute.[11] The court reached this conclusion by citing § 550 of the Bankruptcy Code for the uncontroversial proposition that "a trustee may only avoid a transfer to a 'transferee,'" and Eleventh Circuit case law for the definition of "transferee."[12] In

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[6] *Id.* at 1240 (stating that Kaiser argued that "§ 546(e) does not protect a settlement payment 'by' a stockbroker" unless the payment is also made "to another participant in the clearance and settlement system").

[7] *Id.* at 1241.

[8] *Munford v. Valuation Research Corp. (In re Munford, Inc.)*, 98 F.3d 604 (11th Cir. 1996).

[9] *Id.* at 607.

[10] *Id.* at 602.

[11] *Id.*

[12] *Id.*

doing so, the court determined that the financial institutions involved in the transaction were not "transferees," and thus irrelevant to the § 546(e) analysis, because, parroting the Eleventh Circuit standard, "the banks never acquired a beneficial interest in the funds."[13] Although that was the extent of the court's analysis, this was the only other circuit court that has even attempted to read § 546(e) in a manner consistent with the remainder of the chapter 5 of the Bankruptcy Code.

The dissent in *Munford* latched on to the "beneficial interest" language used by the majority to define a "transferee," mischaracterized its role in the majority's analysis, and then rejected it without a single citation.[14] The dissent did not even attempt to engage in any analysis of the statutory language.[15] Rather, the dissent was based solely on the unsupported "belief" that the majority was trying to "create a new exception to [the] application" of § 546(e).[16] Due to the lack of focused attention on this issue in the few cases that followed, this unsupported "belief" found its way into the jurisprudence of the Second, Third, Sixth, and Eighth Circuits during the ensuing decades.

The next circuit court to address the meaning of the words "by or to" was the Third Circuit in *In re*

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[13] *Id.*

[14] *Id.* at 614 (dissent).

[15] *Id.*

[16] *Id.*

*Resorts International*.[17] The *Resorts* court, however, simply adopted, with no analysis of its own, the two-sentence dissent from *Munford*.[18] Shortly thereafter, the Second, Sixth, and Eighth Circuits, also with no analysis of § 546(e)'s language in the context of chapter 5, simply adopted the holding in *Resorts*. In relying on *Resorts*, none of these other circuit courts added to the *Munford* dissent's "analysis" of the statutory language:

- *Contemporary Industries Corp v. Frost*.[19] The Eighth Circuit, after reciting the opinion of the *Munford* majority, rejected it by citing *Resorts*.[20]

- *Quality Stores, Inc. v. Alford (In re QSI Holdings Inc.)*.[21] The Sixth Circuit rejected the *Munford* majority without any of its own analysis by citing both *Resorts* and *Contemporary Industries*.[22]

- *Official Committee of Unsecured Creditors of Quebecor World (USA) Inc. v. American United Life Insurance Co. (In re Quebecor World USA Inc.)*.[23] The Second Circuit simply followed "the

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[17] *Lowenschuss v. Resorts Int'l, Inc. (In re Resorts Int'l, Inc.)*, 181 F.3d 505 (3d Cir 1999).

[18] *Id.* at 516.

[19] 564 F.3d 981 (8th Cir. 2009).

[20] *Id.* at 987–88.

[21] 571 F.3d 545 (6th Cir. 2009).

[22] *Id.* at 551.

[23] 719 F.3d 94 (2d Cir. 2013).

> Third, Sixth, and Eighth Circuits in holding that a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit."[24] The court then relied on legislative history to summarily conclude that "a transaction involving one of these financial intermediaries, even as conduit, necessarily touches upon these at-risk markets."[25] In doing so, however, the court altogether failed to explain what part of the statutory text states that the safe harbor applies when a transfer "touches upon" at-risk markets.[26]

Finally, the most recent circuit court to address this issue, outside of the Seventh Circuit, was the Second Circuit in *Tribune*.[27] In that case, however, the court examined the issue under entirely distinct legal circumstances. There, the issue before the court was whether § 546(e) preempted state-law fraudulent transfer claims brought by the creditors of a bankrupt company.[28] The Second Circuit, in ruling on the preemption issue, never specifically addressed the pertinent question here: whether the safe harbor protects transfers that are simply conducted through Protected Entities acting as conduits where neither the debtor nor the transferee were Protected Entities.

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[24] *Id.* at 99.

[25] *Id.* at 100.

[26] *Id.*

[27] *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) [hereinafter *Tribune*].

[28] *Id.* at 105.

The factual circumstances of *Tribune* are also far from clear, making it difficult to determine whether the meaning of the words "by or to" as used in § 546(e) was dispositive to the Second Circuit's holding. As an initial matter, the defendants in *Tribune* stood in different factual circumstances to each other and to Defendant here. For example, some of the defendant-recipients of the alleged fraudulent transfers in *Tribune* certainly appear to be Protected Entities.[29] If § 546(e) does generally preempt state-law claims and the defendants in *Tribune* are Protected Entities, then under the Seventh Circuit's interpretation of § 546(e), the safe harbor would apply because the transferees themselves are Protected Entities.

Moreover, it is not apparent from the Second Circuit's ruling whether the "intermediaries" effectuating the transfers were mere conduits or, rather, the initial transferees of the funds (such that the ultimate recipients—*i.e.*, the shareholders—were actually subsequent transferees).[30] Based upon these facts, it is not evident whether the particular interpretation of § 546(e) adopted by the Second Circuit was outcome determinative or simply dicta.

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[29] For example, a group of defendants in *Tribune* are identified as "Financial Institution Holders." Other defendants in *Tribune* that appear to be Protected Entities enumerated in § 546(e) include Merrill Lynch, Pierce, Fenner Smith, Inc., Taft Harltey Funds, Morgan Stanley & Co. Inc., Morgan Stanly Capital Services, Inc., Citigroup Global Markets, Inc., CA Public Employee Retirement System, among many others.

[30] If the "intermediaries" in *Tribune* were transferees as opposed to mere conduits—a factual issue not considered by the *Tribune* court—then the transfers would likely fall within the safe harbor even under the Seventh Circuit's interpretation of the statute.

Furthermore, like every other circuit court that has addressed this issue, the Second Circuit failed to perform the proper analysis necessary to divine congressional intent. The Second Circuit recognized that the "search for legislative purpose is heavily informed by language, and analyzing all the language of a provision *and its relationship to the Code as a whole* is preferable to using literalness here and perceived legislative purpose (without regard to language) there as needed to reach particular results."[31] But then, inexplicably, immediately disregarded this fundamental cannon of statutory construction based upon its own perception of congressional intent.[32] It was only by substituting its own perception of congressional intent, without any attempt to place the relevant language within its statutory context, that the court arrived at its erroneous conclusion that Congress intended § 546(e) to "protect[] transactions rather than firms."[33]

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[31] *Id.* at 120 (emphasis added) (citing *King v. Burwell*, —— U.S. ——, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) ("[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.").

[32] *Id.* ("We do not dwell on this because we perceive no conflict between Section 546(e)'s language and its purpose.").

[33] *Id.* at 121. Of course, if Congress intended to protect all transactions—*e.g.*, "settlement payments" and transfers "in connection with a securities contract"—it was unnecessary for Congress to include the long list of enumerated entities in the statute. Under the Second Circuit's flawed interpretation of the statute, the list of Protected Entities is entirely superfluous.

In short, none of the cases discussed above performed the analysis necessary to properly interpret the statutory language of § 546(e). The few conclusory remarks made by, in particular, the Third, Sixth, and Eighth Circuits, on the meaning of the words "by or to" in § 546(e) do not evidence a "deep divide" on the statutory-interpretation question presented here. And the Second Circuit's conclusions in *Tribune* may have been dicta. Accordingly, the circuit courts should be given the opportunity to consider and, where appropriate, re-visit *en banc* the meaning of the phrase "by or to" in light of the Seventh Circuit's detailed opinion below. Only then can the Court determine whether the circuits are truly divided on this issue.

### B. Petitioner Misstates the Seventh Circuit's Opinion.

Merit's arguments in support of its petition rely upon plain misstatements of the Seventh Circuit's opinion and analysis. Merit first argues that the Seventh Circuit erred by disregarding the plain language of the statute. (Pet. 15). The Seventh Circuit, however, expressly examined the plain language of § 546(e). (*See* Pet. App. 5–6). Indeed, only by doing so could the Seventh Circuit have reached the conclusion that the plain language of the statute was subject to multiple plausible interpretations. (*Id.*). The Seventh Circuit then, in accordance with well-established principles of statutory construction, examined the context and purpose of the statute to choose between the multiple plausible interpretations. (*See generally id.* at 7–18).

Merit's second argument—that the Seventh Circuit mistakes breadth for ambiguity—fairs no better. (Pet. 16). On the contrary, the Seventh Circuit expressly recognized the breadth of the safe harbor codified in section 546(e), but held that "that does not mean that there are no limits." (Pet. App. 15). Furthermore, in articulating this argument, Merit accuses the Seventh Circuit of interpreting a disjunctive "or" as a conjunctive "and." Specifically, Merit argues that the Seventh Circuit erroneously interpreted the language "by or to (*or* for the benefit of)" to mean "by or to (*and* for the benefit of)." (Pet. 16 n.6). This is also a misstatement of the Seventh Circuit's opinion and ignores the detailed analysis the Seventh Circuit undertook to interpret the meaning of the phrase. Merit's misunderstanding of the Seventh Circuit's opinion is based upon its own interpretation of the phrase "for the benefit of" to mean "beneficial interest in." (*See* Pet. App. 17). The Seventh Circuit considered and specifically rejected this interpretation. (*Id.*). And for good reason. Among other reasons cited by the Seventh Circuit, Merit's interpretation leads to the unavoidable, and absurd, conclusion that prior to the addition of the phrase "(or for the benefit of)" in § 546(e), the safe harbor applied *only* in circumstances where a Protected Entity acted as a conduit, but not where it actually received the value of the transfer or could otherwise be subject to fraudulent transfer liability. Such an interpretation cannot be squared with any of the legislative history or jurisprudence on the meaning and application of § 546(e).

Merit's final misstatement of the Seventh Circuit opinion highlights the rigor the court used to reach its

conclusion and Merit's misunderstanding of the legal framework courts are required to use to interpret statutory language.[34] Far from substituting its understanding of Congress's goals for the language Congress used in § 546(e), the Seventh Circuit engaged in an in-depth review of the statutory text to interpret it as a symmetrical and coherent regulatory scheme. The Seventh Circuit, among other things, considered the statutory language Congress used in §§ 544, 547, 548, 550, and 555 of the Bankruptcy Code, among others, to inform its conclusion as to meaning of the words Congress used in § 546(e). (*See generally* Pet. App. 1–18).

The Seventh Circuit's analysis of the other provisions of chapter 5—including other defenses granted to Protected Entities (*e.g.*, § 548(d)(2)) and the Bankruptcy Code's other safe harbors (*e.g.*, § 548(a)(2))—stands in stark contrast to the "analyses" performed by the other circuit courts. It is precisely because the Seventh Circuit is the only court to evaluate § 546 in the context of chapter 5 as a whole that it would be premature for the Court to review this issue.

### C. The Court Should Not "Hold" Merit's Petition

Merit's request that this Court "hold" its petition if it grants the petition in *Tribune* because the disposition of the *Tribune* case *may* control in this case should be rejected. This Court's "hold" policy is based

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[34] *See, e.g.*, *Davis*, 489 U.S. at 809.

upon the concept "that like cases must be treated alike."[35] This case, however, is nothing "like" the *Tribune* case. As discussed above, the meaning of the statutory phrase "by or to (or for the benefit of)" found in § 546(e) may not control the outcome of the *Tribune* case. To be sure, the facts of *Tribune* are so dissimilar to the facts of this case that it is entirely plausible that the outcome of *Tribune* would not apply here. Furthermore, if the Court were to grant the *Tribune* petition, the Court could conceivably resolve the preemption issue presented there without ever reaching the question presented here. As such, and for the reasons stated above, the court should deny Merit's petition and send the case back to the District Court regardless of whether it grants or denies the petition in *Tribune*.

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[35] *Straight v. Wainwright*, 476 U.S. 1132, 1135, 106 S. Ct. 2004, 2006, 90 L. Ed. 2d 683 (1986).

## CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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# APPENDIX

## RELEVANT STATUTORY PROVISIONS

### 11 U.S.C. § 550

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section [1] (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider; the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)

(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.